Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

Comments Of The
Home Recording Rights Coalition
In Response To Further Notice
Of Proposed Rulemaking

The Home Recording Rights Coalition ("HRRC") endorses the December 19 proposal for regulatory action jointly recommended by representatives of cable operators and consumer electronics manufacturers and urges swift enactment of these regulations in the form proposed. In the one area not addressed in the joint recommendations -- the treatment of program "Downresolution" in the proposed regulation dealing with "Encoding Rules" -- HRRC urges fully equivalent treatment to that afforded "Selectable Output Control." Both of these practices, in the context of initial consumer receipt and viewing of MVPD programming, would be unsupportable, unnecessary, and unconscionable as impositions on the viewing public and discrimination against early DTV and HDTV adopters.

HRRC has been working to protect consumer rights, practices, and expectations since October, 1981, when the first consumer VCR was declared illegal by a court. That decision's 1984 reversal by the U.S. Supreme Court marked a turning point in favor of innovation and consumer fair use. Twenty years ago, the issue was essentially a legal one -- whether product innovations such as the VCR should be suppressed, out of concern that recording within the home would damage content providers. Today the question before the Commission is essentially one of license in the context of a congressional mandate, a regulatory proceeding, and product specification and licensing powers already delegated by the Commission to a regulated industry: To what extent may home-based consumer electronics and information technology products be constrained through the licensing of specifications under authority granted by the Congress to the FCC, and delegated to a private party?

Based on prior Commission determinations in these Dockets, any manufacturer that would offer a DTV receiver or a set-top product capable of connecting directly to a cable system would have to sign a license offered by the MVPD interests that today still control 100% of the navigation device market. The license in question, though "private," is mandatory as a direct result of the congressional action in Sections 624A and 629,[1] and is offered by CableLabs on behalf of cable MVPDs only because the Commission explicitly delegated to these MVPDs the authority, subject to the Commission's regulations, to license such entrants on a fair and neutral basis.[2]

At stake in the Commission's declared oversight of this license[3] are policy issues that, depending on whether the jointly proposed regulations are accepted, will be determined either through a balanced, joint recommendation of the parties in interest, building on years of private and public sector negotiation and action, or by one party's fiat, with no effective Commission oversight. After years of discussion (and public policy interventions by HRRC and many others via congressional hearings and FCC filings), the major cable operators have agreed to a balanced regime -- a license, with limited "compliance" rules, to be governed by balanced "Encoding Rules," *so long as* this outcome applies equally to all MVPDs.

For HRRC, the cable television industry's acceptance of a balanced public policy result, rather than continued insistence on a take-it-or-leave-it-if-you-want-to-enter license, marks perhaps *the* crucial turning point in what has been a very long road. Now, as a result of Section 624A, Section 629, and the Commission's prior determinations in these Dockets, the FCC holds the key to competitive entry in all sectors. The alternative is a reversion to the standoff in which individual MVPDs, anxious to secure content, have felt compelled to impose one-sided license terms on competitive entrants. Such a result would disenfranchise millions of HDTV consumers while the FCC, in its congressionally mandated oversight role, stands by.

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[1] *In the Matter of Implementation of Section 304 of the Telecommunication Act of 1996, Commercial Availability of Navigation Devices,* CS Docket 97-80, *Report & Order*, 13 FCC Rcd 14775 (Rel. June 24, 1998) (*"Navigation Device R&O"*); *Cf. In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket 00-67, *Report & Order*, 15 FCC Rcd 17568 (Rel. Sept. 15, 2000).

[2] *Id. and In the Matter of Implementation of Section 304 of the Telecommunication Act of 1996, Commercial Availability of Navigation Devices,* CS Docket 97-80, *Order on Reconsideration*, 14 FCC Rcd 7596 (Rel. May 14, 1999) (*"Navigation Device Reconsideration Order"*).

[3] *See Navigation Device R&O* and *Navigation Device Reconsideration Order.* On May 10, 2002, the Commission staff requested in writing that parties to "Hoedown" roundtable conferences held by the Media Bureau in its oversight capacity make filings in Docket No. 97-80 on regulatory issues pertaining to the licensing of competitive entrants. These June 6, 2002 filings are referred to hereinafter as "Hoedown" filings.

I. The Jointly Recommended Encoding Rules Are The Result Of A Decade Of Private Sector Negotiation And Licensing, And Congressional Action.

In 1993, in response to requests from the leadership of the Senate Judiciary Committee, HRRC, the Consumer Electronics Association ("CEA") and the Motion Picture Association of America ("MPAA") began negotiations to develop and propose a "Digital Video Recording Act" ("DVRA"), that would rely on technical means of copy control but recognize and preserve consumers' settled expectations and practices. The parties recognized that if technology were to be designed into consumer products to recognize and respond to digital control mechanisms, consumers would be put at risk. Their accustomed uses of home recorders and displays could be frustrated by the remote triggering of these mechanisms by content providers or distributors. Therefore, at the outset it was agreed in principle that, in exchange for the cooperation of consumer electronics companies in developing and implementing technologies that could block consumer recording, content providers would accept "encoding rules" to limit the application of these technologies to clearly recognized, stated, and defined circumstances, and no others. **It was clearly understood by all that these "Encoding Rules" were limitations on the use of technical measures so as to enable licensing and regulatory results that conform to consumer expectations, and *not* any substitute for or iteration of the case-by-case determination of copyright fair use outcomes.** Acceptance of this principle has been the bedrock for all subsequent inter-industry discussion with respect to copy control.[4]

For three years, HRRC, CEA and MPAA negotiated in good faith to put this bargain into practice. In March of 1996 they announced agreement on a draft "DVRA" that would have done so. When representatives of the Information Technology industry objected to the particular technical and legislative means that were drafted, the consumer electronics, motion picture, *and* information technology industries then formed the Copy Protection Technical Working Group ("CPTWG"). CPTWG broadened the previous technical inquiry, to explore methods that included digital encryption and authentication, as well as forms of "status marking" in addition to those anticipated in the draft DVRA. The policy intention behind such efforts, as manifested in subsequent licensing agreements and legislation, remained the creation of measured technical tools to address recording practices.

The detailed negotiation of specific rules as to when "no copy" or "one generation" encoding could be applied took several years. Essentially, the rules allowed application of no-copy encoding to one-time distributions on a program-

[4] The "Encoding Rule" principle was not even novel with this 1993 agreement in principle. It was also the basis for all technological provisions of the Audio Home Recording Act of 1992, which stemmed from a similar 1989 agreement in principle reached by representatives of the consumer electronics and recording industries.

by-program basis, and that were relatively close in time to the date of theatrical release. Consumer recording expectations were protected as content was delivered through channels and at dates more distant from initial release. The "DVRA" rules provided:

- *"No copy"* encoding may be applied to packaged home video, pay-per-view, and video-on-demand programs.

- Consumers may record from pay-cable channels, but *"no copy"* encoding may then be applied to the *consumer copies.*

- Consumers have the unconstrained right to record from all other program services, including basic cable or its equivalent, from any programming originating as a free terrestrial broadcast, and from any copies of such programs.

The Congress adopted and enacted, without change, these "DVRA" rules in Section 1201(k) of the Digital Millennium Copyright Act of 1998 ("DMCA").[5] Section 1201(k), the only affirmative mandate contained in the DMCA, applies to analog VCRs and imposes a duty to respond to widely used "Macrovision" anti-copy encoding. Section 1201(k) does not apply to digital recording because, in the DMCA, Congress did not mandate the use of any particular digital technical measures. It was anticipated that such measures could and would be enforced, instead, through multi-industry license agreements pertaining to technology and/or regulatory oversight in appropriate cases.

The DVRA / DMCA consensus encoding rules became a basis for a license agreement that emerged from the CPTWG process. MPAA members negotiated a form of license with the "5C,"[6] a group of five companies that had merged their technologies that initially were discussed separately in a CPTWG work group, the "Digital Transmission Discussion Group."[7] This license essentially adopted the DVRA / DMCA encoding rule outcomes, with the exception that the status of MVPD programs (other than free terrestrial broadcasts) at the level equivalent to "basic cable" was changed from "copy freely" to "copy one generation." HRRC understands that, to date, two MPAA member studios have signed this license. (No objection from other studios to the 5C Encoding Rules is on record.)[8]

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[5] 17 U.S.C. § 1201(k). Although codified with the Copyright Act, the DMCA is not a copyright provision and does not depend on determinations of copyright infringement.

[6] More formally, "Digital Transmission License Administrator," which offers a license for its "Digital Transmission Content Protection" technology. *See* www.dtcp.com.

[7] CPTWG supports discussion and technical comparison processes, but does not involve itself in technology choices or business issues. HRRC is a CPTWG participant.

[8] These outcomes also are recognized and implemented, via the 5C Encoding Rules, in digital video recorders currently on the market that use the Copy Protection for Recordable Media ("CPRM") and D-VHS recording formats.

In FCC staff multi-industry "Hoedown" discussions, and the subsequent filing of Comments addressing the license terms to be offered to competitive entrants by the cable industry, neither the cable nor the MPAA representatives expressed any reservations to the Commission about the appropriateness of these "5C" encoding outcomes, as a reference benchmark, as governing limitations to balance the restraints required by such a license. Rather, the cable industry representatives said that, given Section 629's application to all MVPDs, and the competition of cable and satellite providers for programming, it would be unfair and unacceptable for such encoding rules to apply *only* to cable, and not to satellite, operators. They also said that it would be difficult or impossible to bind content providers in the sole context of a license agreement between cable operators and equipment manufacturers.[9] MPAA has adhered to the position that (1) DBS practices must be among the measuring sticks for the appropriateness of cable license provisions, and (2) navigation devices subject to copy protection rules inferior to those for other navigation devices **will not receive content**.[10]

II. The Parties Have Achieved An Appropriate And Necessary Balance Of The Deployment Of Copy Protection Technology And The Limits Thereon.

HRRC has argued in prior FCC filings that the cable industry ought to recognize its delegated licensing authority under Sections 624A and 629 as a public trust, so should not use this power in favor of business goals or impositions on consumers that would be against public policy. HRRC has said that these limits should be expressed in the license itself and, as necessary, through amendments to the FCC regulations that govern this license. In application, this has meant that the license "Compliance Rules" governing device function, and Encoding Rules governing the triggering of technical constraints, should support rather than frustrate settled consumer viewing and recording expectations.[11] This is what the cable industry has agreed to, and the parties have spelled out, in the December 19 "Plug & Play" agreement.

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[9] Letter to W. Kenneth Ferree from Richard R. Green, Cable Television Laboratories, Inc. and William A. Check, National Cable & Telecommunications Association, Re: *Commercial Availability of Navigation Devices*, CS Docket No. 97-80; *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67. *See, e.g.*, par. 13.

[10] Letter from Fritz E. Attaway, Motion Picture Association, to W. Kenneth Ferree, FCC, Re: MPAA Responses to May 10 Phila Hoedown Questions Relating to Copy Protection (June 5, 2002).

[11] Noted by the Commission, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Further Notice of Proposed Rule Making and Declaratory Ruling* (Rel. Sept. 18, 2000) par. 28.

A. The Draft Regulation And License Provisions Will Enable And Support The Operation Of New Generations Of Home Recording Devices Directly On Digital Cable Systems.

It was a congressional objective, in passing Section 624A in 1992, and Section 629 in 1996, that the direct connection of recording devices and other competitive products (in addition to "set top converter boxes" and displays) be supported on digital cable systems.[12] Direct connection of recording devices and PCs is effectively frustrated by versions of the "PHILA" license that are presently available. The direct connection and operation of such devices is, however, supported by the model "DFAST" license, and its Compliance Rules, appended to the December 19 letter.

As the *Betamax* case taught, reasonable and customary consumer expectations begin with the reasonable availability to consumers, in the first instance, of the recording equipment in question -- that is what the case was all about.[13] In writing Compliance Rules and recommending Encoding Rules, the parties have reached an essential result, making it possible for consumers to obtain, attach, and use such devices. Any lesser result, under FCC oversight of the license, would be a public policy failure.

B. The Model License Compliance Rules Do Not Require Responses To Selectable Output Control Or Downresolution Encoding But Do Require Response To All Copy Protection Encoding, Irrespective Of The Nature Of The Program Or Its Means Of Transmission**.**

The model DFAST license Compliance Rules for Unidirectional Devices do not require these devices to respond to Selectable Output Control ("SOC") and Downresolution triggers (discussed below). However, they do require responses to *all* copy protection triggers, and make no distinction between, *e.g.*, Video on Demand programming on the one hand and cable transmissions of free terrestrial broadcasts on the other. In both cases, without Encoding Rules, the consumer would be at the mercy of whichever copy protection triggers are chosen by the content provider or distributor. Even in the case of SOC and Downresolution, not all MVPD navigation devices (cable and satellite) will be subject to this license. Therefore, without Encoding Rules, consumers relying on such devices would be subject to these practices, as well.

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[12] 47 U.S.C. § 549; *Cable Television Consumer Protection and Competition Act of 1992,* Pub. L. No. 102-385, 102 Stat. 1460 (1992). *See, e.g.*, Statement of Senator Leahy, 138 Cong. Rec. S 561 (Jan. 29, 1992).

[13] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Betamax*"). The plaintiffs asked the court to enjoin the sale of such devices to consumers.

This is not a technological or regulatory outcome that, as the history described above shows, has ever been acceptable either to the Congress or in the context of private sector licenses. Hence, the parties recognized that Encoding Rules were a necessary limitation on the use of technology to which responses would be mandated by other elements of the December 19 "Plug & Play" agreement.

C. The Draft Encoding Rule Regulations Follow The Models Adopted By the Congress In DMCA Section 1201(k) And The Private Sector In The '5C' License, As Previously Cited By the Commission.

As is reviewed in the history set forth at the outset, the jointly recommended Encoding Rules follow a consensus pattern originally negotiated with the motion picture industry in the DVRA, then accepted in the DMCA, that the MPAA has cited to the Commission, and the Commission noted in its September, 2000 Declaratory Ruling in these Dockets.[14] In combination with the license Compliance Rules, the ban on Selectable Output Control, and a similar ban on Downresolution, these Encoding Rules establish the balanced, pan-industry regime for MVPDs that, in principle, members of the content, cable, and consumer electronics industries have all said is essential. Failing to adopt such a regime would make meaningless and ineffectual the FCC's oversight of the specification and licensing authority that it has delegated, in these Dockets, to the cable industry.

III. It Is Essential That The Encoding Rules Not Authorize The Use Of Either 'Selectable Output Control' Or 'Downresolution' Triggers As A Species Of Conditional Access.

The jointly recommended encoding rules do not allow the triggering of Selectable Output Control (SOC) under any circumstances, but ban Downresolution triggers only in the context of MVPD transmissions of free, over-the-air terrestrial broadcasting. (They make no recommendation re Downresolution in other contexts.) It is essential to the protection of the consumer and competitive interests addressed by the Congress in Sections 624A and 629 that neither trigger be authorized by the Commission.

[14] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Further Notice of Proposed Rule Making and Declaratory Ruling* (Rel. Sept. 18, 2000) par. 28, n.66.

A. Selectable Output Control And Downresolution Both Would Deprive Consumers Of Competitive Choice And Would Destroy Settled Expectations, Including The Simple Viewing Of Programs That Have Been Lawfully Received.

"Selectable Output Control" ("SOC") is the remote signaling of home devices by content providers or distributors, to turn off consumer home interfaces on a program-by-program basis. The interface in question would simply not operate for the particular program. Implementation of SOC would mean that a consumer who has purchased an HDTV display, and pays for a set-top box or other device with an HDTV output, still might not receive all of the HDTV programs for which he or she has paid -- because for particular programs the interface between the set-top box and the HDTV display has been turned off by remote control. **Imposition of SOC would have the likely effect of driving from the market any home interface that supports home recording.** HRRC has opposed imposition of SOC by law or in any context subject to regulation.

SOC is activated by data "triggers" that ride along with program information when it is sent to the home. Some content providers have promoted, to the Society of Motion Picture and Television Engineers (SMPTE) and other standards organizations, a draft technical standard called "Extended Copy Control Information" ("ex-CCI") that includes these triggers and would provide for a response to them in any consumer electronics or computing device that complies with the standard. So, SOC could be imposed simply by making mandatory, in any patent or other license governing a device, a response to all "ex-CCI" triggers.

Mandatory response to SOC has been included in CableLabs' "Open Cable Access Platform" ("OCAP") specification. Adherence to all aspects of OCAP would be required by the "POD-Host Interface License Agreement" ("PHILA"), a license that has been required of all competitive products. However, the Compliance Rules of the model DFAST license appended to the December 19 joint letter to Chairman Powell would not mandate any response to SOC triggers.

"Downresolution" is the remote signaling of home devices by content providers or distributors, to degrade the signal quality of HDTV "Component Video" outputs on a program-by-program basis (so as to discourage marketing of HD-capable recorders with such Component Video inputs). These are the only HDTV inputs of 4 million-plus "HD-ready" television monitors that have been sold to date. Application of "downresolution" to a signal would mean that a consumer who has purchased an HD-ready display, and pays for a set-top box or other device with an HDTV output, would not receive an HD-quality signal for those programs as to which "downresolution" has been triggered. Downresolution cuts both the horizontal and vertical resolution in half, resulting in a picture with 1/4 the pixels of a true HDTV program. HRRC has opposed

imposition of Downresolution by law or in any context subject to regulation.

Downresolution, like SOC, is activated by "ex-CCI" data "triggers" that ride along with program information when it is sent to the home. So, like SOC, "downresolution" could be imposed simply by making response to all "ex-CCI" triggers mandatory, in any patent or other license governing the device. Mandatory response to downresolution triggers, in component video HDTV outputs, has been required by the "PHILA" production license that is the only production license presently available for any competitive product. However, the model DFAST license appended to the December 19 joint letter to Chairman Powell includes Compliance Rules that do *not* require licensed devices to respond to any such triggers.

B. It Is Essential To Settled Consumer Expectations That The Commission Adopt The Jointly Recommended Ban On Selectable Output Control, And Implement A Similar Ban On The Triggering Of "Downresolution."

Consumers who invest in HDTV and digital television products have a reasonable expectation that they will be able to take advantage of the essential features of those products. Fundamental among these expectations are that source devices with digital outputs will reliably deliver digital signals to the digital inputs of display devices and recorders, and that programming delivered in high definition can be watched, recorded and enjoyed in full quality. SOC and Downresolution inherently will frustrate these essential expectations, with the predictable consequence of deterring consumer investment in digital television and digital home networking.

Using SOC, a rights owner remotely can decide whether a particular program is available through a "1394" output, a "DVI" output, an HDTV component video output or, indeed, only via NTSC. If SOC is not banned by the Commission, consumers never can be certain whether a particular program will be available in a particular output format. Consumers will not know when they program their video recorders whether a particular program can be recorded digitally (through a 1394 output) or whether the Encoding Rules will be eviscerated by the content owner's selection of only the unrecordable, display-only DVI or HDMI digital outputs.

In addition to threatening consumer recording rights, SOC thwarts consumer viewing rights as well. If programming is available only through a DVI (or "HDMI") digital output, then a consumer who purchased an HDTV display with only a 1394 input will be unable to watch programming in full digital quality. Even those consumers who do have displays with multiple digital inputs would have to incur the added expense and inconvenience of connecting both outputs to the display, and switching incessantly, merely to ensure his or her ability to watch the programming to which the consumer has subscribed. A

consumer who owns a receiver with only an HDTV component video input may be precluded from watching high definition signals if the rights owner remotely decides to select only the NTSC signals.

Downresolution inherently denies consumers the full quality signals that the consumer has the right to expect, whether watching over-the-air HD broadcasts or receiving HDTV through a set-top box. Consumers would find it bizarre indeed if they could watch the over-the-air signals in full HD quality, but could see the same programming through their cable system only in one-fourth the resolution. Similarly, consumers reasonably would be up in arms if they paid subscription fees to get access to programming that looks one-fourth as good as broadcast television.

Ultimately, the power to invoke either Selectable Output Control or Downresolution means inefficiency, uncertainty and risk that will deter consumer willingness to invest in the future of HDTV. It would be bitterly ironic if the Commission, in approving the plug and play regulations, would smooth the way toward a swift and successful roll-out of DTV to the consumer, but simultaneously erect in its path the twin roadblocks of SOC and Downresolution.

IV. Conclusion.

It is a simple fact, that cannot be ignored, that for the last several years, consumer expectations for viewing and recording of most television programming received in the home have depended on the FCC's oversight authority for MVPD navigation devices. If the FCC decides that it has authority to empower cable operators and CableLabs (and, by extension, the content providers who supply programming) to *cut off* consumer viewing and recording rights and expectations through technical measures, but *not* the authority to accept or require any *limitations* on the triggering of such measures, the Commission will have dealt the consumer investment in the DTV and HDTV transitions a huge setback. This would be the opposite of the result that Congress explicitly intended when it enacted Sections 624A and 629.

While HRRC prefers outcomes that place maximum trust in the fairness and reasonableness of most consumers, it recognizes in the copy protection provisions of the "Plug & Play" recommendations a balanced approach consistent with prior public and private sector outcomes on these issues. Acceptance of this approach would be in line with prevailing public and private sector policy to date. Rejection of such balance would be grossly out of step, and would be a debacle for American consumers.

Respectfully submitted,

THE HOME RECORDING RIGHTS COALITION

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